BOOK REVIEWS.

THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND. Two vols. Herbert Thorndyke Tiffany. St. Paul: Keefe-Davidson Co. 1903. pp. xxiii, 1589.

This excellent handbook of property law challenges serious consideration, both by reason of its substantial merits and because of the favor with which it has been received by the most competent authorities. It should be said at the outset that it is a thoroughly sound and conscientious piece of work. The author has neglected no authoritative source of information, and he has, within the limits of his plan, fully utilized the literature of the subject. The treatment as a whole is intelligent and well-proportioned. While not infallible, the author has attained a remarkable degree of precision of statement. His head-notes, in which the law of each chapter is summarized, are models of clear and accurate expression. And yet, notwithstanding these merits, the book leaves something to be desired.

It is a sound canon of criticism that a work shall be judged by its own aims and not with reference to the standards of a different order of composition. It is no reproach to Richard Strauss that he failed to attain the style and method of Beethoven, nor do we judge a dictionary or an encyclopedia by a reference to the literary form of a poem or an essay. If a law-book be excellent of its kind, and if the kind of book which it represents have a place in legal literature, we do not condemn the work in question for failing to be something other than it is. We may even admit that a student's horn-book, if it be a good horn-book, need not apologize for not being an original contribution to legal doctrine. There is, indeed, a bit of assumption in the criticism of an author for working his own vein instead of that which his critic would have chosen for him. We may, perhaps, be pardoned for believing that the fine talent of Professor Maitland or of Mr. Justice Holmes is better employed in the field of legal history and criticism than it would be in the work of digesting decisions, but shall we therefore conclude that Mr. Bishop and Mr. Leonard Jones and Mr. Tiffany have misconceived their tasks!

Reduced to its proper proportions, then, the authority of the critic extends no further than to classify the work under consideration and to determine its place in the class to which he has assigned it—assuming, of course, that the book and the class to which it belongs have a place in the literature of the profession. Excluding, at one extreme, books on legal history and general legal theory, and, at the other extreme, cram-books prepared to meet the exigencies of examinations, legal text-books may be roughly divided into three classes. First, the treatise proper, in which legal principles are newly set

forth and discussed and which derives a certain authority from the weight of the views advanced and the force of the argument in which they are presented. Our legal literature is rich in works of this character, the law of real property, with which we are here concerned, furnishing such admirable examples as Fearne on Contingent Remainders, Sugden on Uses, Jarman on Wills, Rawle on Covenants for Title and Professor Gray's monographs on the Rule against Perpetuities and Restraints on Alienation. Then we have the elementary text-book for the use of students, which should differ from the treatise proper only in a more restricted choice of topics, a less minute and exhaustive method of treatment and in the employment of language adapted to the untrained understanding, but with no glossing over of difficulties, no oracular deliverances, no bare-faced attempt to set forth "the law as it is." Books of the sort here indicated are rare in our legal system, the needs of the student having been too much subordinated to those of the practicing lawyer, but we may refer to Anson on Contracts and Pollock on Torts as favorable examples of this kind of literature. The third class comprehends by far the greater part of the works which we loosely classify as legal text-books, and may be described as text-book-digests. Their aim is to set forth the law and the whole law of a subject in condensed form and orderly arrangement, with little or no criticism of the authorities cited and no serious attempt to explain or reconcile apparently conflicting decisions. In such works originality has no place excepting in the arrangement of the digested material, and they derive their authority, not from the soundness of the author's views or from any cogency of argument, but solely from the accuracy and perspicuity of his statements of the law as he has found it embodied in the decisions and other authoritative sources. Books of this sort cover a wide range of style and excellence from the oracles of Littleton, and the accurate and well-organized learning of Leake to the loose-jointed abridgments of an older generation and the legal encyclopedias of to-day.

It is no disparagement of the work under consideration to say that it belongs clearly to the last of these classes. It is not a book for law-students; it is not a book to resort to for legal doctrine or for help in solving vexed problems; it is plainly and unequivocally a book of reference. It is not a reasoned exposition of the great subject with which it deals. There is no discussion of principles. The author seldom takes sides on controverted points. Rarely, indeed, does he give us a glimpse into his own mind. What he has given us is simply a colorless statement of the decisions. As has been said, this work has been performed not only conscientiously but most intelligently. The cases have been carefully read and the *ratio decidendi* firmly grasped and separated from the dicta.

Indeed, so well has this been done that one is tempted to regard it, in part at least, as the result of the inductive method of law-study as pursued in the best law schools to-day. But this method is not without its dangers for the writer of law books. The careful, searching analysis of the case, on which it is based, is

indeed indispensable to the formation of the lawyer-like habit of mind, but it is not the whole of that mind. There remains to be added—whether through the practice of law or wider reading and discussion or through the instinct of the "born lawyer"—a sense of legal values, a consciousness of the professional sentiment which may invalidate a decision as soon as it is uttered, and a new respect for the dictum when supported by that sentiment.

It may be objected that there is no room in the text-book-digest for this *penumbra* of law; that there everything should be clear and sharply-defined and that the value of such a work is in proportion to the thoroughness with which it has sifted out all these half-lights. Doubtless this is true, but it only emphasizes the fact that the best digest is but an inferior law book. The work has its place, is indispensable, indeed, as a guide through the wilderness of precedents, but there its usefulness ends. It can never take the place of the treatise.

It is in his failure to grasp this fundamental distinction that the author of the work under examination has made his only serious error. Well-nigh perfect in execution, the book is so defective in plan as seriously to impair its usefulness. In aiming to adapt the work to the needs of "those not previously acquainted with the subject," i. e. to prepare an elementary text-book for the use of students, the author has failed to make it "sufficiently full to render" it most "useful to the practicing lawyer." In form and manner of execution the book belongs, as has been said, to the class of digests, but the cardinal virtue of the digest is its fulness and no virtues of accuracy and lucidity will atone for a defect in this particular.

That the completeness of the work as a book of reference has been sacrificed in the futile attempt to make it answer another and inconsistent purpose becomes evident upon a comparison with Washburn's standard "treatise," which has, for nearly half a century been the *vade mecum* of the profession. While the two works cover substantially the same ground, the 1880 closely-printed pages of the older book must contain nearly double the amount of matter contained in that of Mr. Tiffany. That this difference is not entirely due to the greater condensation of the latter, but indicates a more complete and detailed presentation by Washburn becomes evident upon a page by page comparison of a given topic, such, for example, as licenses. Certainly this doctrine is more appropriately grouped by Tiffany with easements than by the earlier writer among estates, but in expounding the doctrine of the revocability of licenses the latest edition of Washburn lays down thirty-eight distinct propositions with their appropriate references, while Tiffany contents himself with eighteen. Again, the effect of an executed license to obstruct an easement is illustrated by sixteen citations in Washburn and by eleven in Tiffany, though neither writer notices the anomalous character of Liggins *v.* Inge (7 Bing. 682) or intimates a doubt as to its correctness. It is entirely probable that the discrepancy indicated by these figures does not hold good

throughout the two works, but the showing made by these sections is by no means exceptional and may not unfairly be taken to represent the degree to which the books respectively attain the ideal of the class of works to which they belong.

Of course this demonstration does not express the relative value of these works. The superior arrangement and more accurate statement of the law of the subject by Tiffany, and, perhaps, his more careful selection of cases for citation, may still entitle him to preëminence over his rival, but the fact remains that, for a work of its class, Tiffany lacks fulness and completness. That it will within its limits answer admirably the purposes of a book of reference for law-students and law-teachers as well as for the profession at large may be gratefully conceded, but it would answer these purposes much more completely if it were filled out to its proper proportions and fitted to its real purpose. Here, then, is Mr. Tiffany's task and opportunity. The task is his by virtue of demonstrated capacity; and the crying need of the profession for a comprehensive work on real property, which shall be as complete in its presentation of the law as it is admirable in arrangement and accurate and lucid in statement, is his opportunity. We await the New and Enlarged Tiffany.

COMMENTARIES ON THE LAW OF MASTER AND SERVANT. Three vols. C. B. Labatt. Rochester, New York: The Lawyers' Co-operative Publishing Co. 1904. Vol. I. pp. lii, 1302. Vol. II., pp. xxiii. 1337.[1]

The frequency with which monumental treatises like this are issuing from the press may well give the lawyer pause. Are they symptoms of a chronic disease now affecting our jurisprudence, or are they simply sporadic? The author's explanation of the size of these particular volumes would indicate that, in his opinion, certain portions at least of our jurisprudence are in a bad way. He writes: "To some readers these volumes will, perhaps, appear immoderately prolix. It may be advisable, therefore, to take this opportunity of explaining that the great length to which they have been extended is due to the impossibility of discussing adequately within a narrow compass the enormous mass of authorities bearing upon a subject which may, without any exaggeration, be said to enjoy the unenviable distinction of having been the occasion of a larger number of conflicting doctrines and inconsistent decisions than any other branch of our law."

The latest English edition of Smith's Master and Servant is but a moderate-sized volume, although it contains a reprint of all the British Statutes on the subject, as well as a consideration of the reported cases to which the Statutes have given rise. Is it necessary that an American treatise on the same subject should be expanded to eight times the bulk of the English work? If it is necessary, then it would seem that the development of this branch of the law by judicial decision has not been very successfully prosecuted in

[1] Volume III is to appear later.